No. 92-1450

In The Supreme Court of the United States

October Term, 1993

Cynthia Waters, Kathleen Davis, Stephen Hopper, and McDonough District Hospital, an Illinois Municipal Corporation,
Petitioners,

v.

Cheryl R. Churchill and Thomas Koch, M.D.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AND THE AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO AS AMICUS CURIAE SUPPORTING RESPONDENTS

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This brief *amicus curiae* is submitted by the National Education Association ("NEA") and the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

NEA is a nationwide labor organization with a current membership of more than 2 million persons, the vast majority of whom are employed by public school districts, colleges and universities. AFSCME is a nationwide labor

organization with a current membership of approximately 1.3 million public employees. The principal issue presented to this Court is whether the discharge of a public employee for engaging in protected speech violates the First Amendment *if and only if* the public employer has the "motive" or "intent" to deprive the employee of her First Amendment rights. The members of the NEA and AFSCME, as public employees, have a direct interest in the disposition of this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is undisputed that the plaintiff-respondent in this case, Cheryl R. Churchill, was discharged from her employment as a nurse for the McDonough District Hospital ("Hospital") *because of her speech.* As the court below stated, "[t]he defendants admit that they fired Churchill because of her conversation with Perkins-Graham on January 16, 1987." Pet. App. at 10. *See also id.* at 6 ("The incident that directly led to Churchill's dismissal was her January 16, 1987 break-room conversation with a cross-trainee, Melanie Perkins-Graham, and Dr. Koch.").

The facts regarding the precise content of Churchill's speech are, however, sharply disputed. Churchill contends that her conversation with Perkins-Graham centered on the Hospital's policy of "cross-training" nurses—an issue of public concern—and that the conversation was not disruptive or insubordinate. The petitioners, in turn, contend—based on co-worker reports of the conversation and a limited investigation into those reports—that the conversation did not center on the issue of cross-training (which petitioners concede is a matter of public concern) and that it was in any event disruptive and insubordinate. Because of this factual dispute, the court below held that summary judgment was inappropriate on the threshold issue of whether the speech involved a matter of "public concern" under *Connick v. Myers*, 461 U.S. 138, 142 (1983), and if so whether the speech constituted *protected activity* under the so-called "*Pickering* balancing

test," *see Pickering v. Board of Educ.*, 391 U.S. 563 (1968), and was therefore an impermissible basis for Churchill's discharge. The *Pickering* balancing test, of course, requires the court in each case "to arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568; *see also Rankin v. McPherson*, 483 U.S. 378, 384 (1987).

Petitioners, supported by the United States, seek to pretermit the application of *Connick* and the *Pickering* balancing test to the facts of this case by arguing that *even if* Churchill's speech was constitutionally protected under those decisions, she nevertheless could be discharged for engaging in that speech if petitioners were unaware at the time of the discharge of the precise aspects of the speech that rendered it protected. This result follows, the petitioners maintain, because a First Amendment unlawful discharge claim under *Connick* and *Pickering* depends on a showing that the employer had a state-of-mind—a "motive" or "intent"—to punish the employee for engaging in protected speech. *See* Brief for the Petitioners ("Pet. Br.") at 24-28; *see also* Brief for the United States As Amicus Curiae Supporting Petitioners ("United States Br.") at 12-17. According to petitioners, the court below thus erred in holding "that a constitutional violation can be found here if the *effect* of defendants' action was to terminate Churchill because of her protected speech, even if that was not their intent." Pet. Br. at 25 (emphasis in original).

We demonstrate in Part I below that a First Amendment unlawful discharge claim under *Connick* and *Pickering* does not depend on any showing that the employer had a "motive" or "intent" to punish the employee for engaging in protected speech. A First Amendment violation is established under those decisions whenever the

purpose *or effect* of the discharge is to punish the employee for engaging in protected speech. To hold otherwise would be contrary to an unbroken line of this Court's decisions rejecting the proposition that a governmental "motive" or "intent" to punish or suppress the exercise of First Amendment rights is a necessary element of a First Amendment claim. Therefore, a public employer who discharges an employee because of speech that is in fact protected by the First Amendment is not relieved of liability merely because the employer was not fully cognizant of the protected nature of the speech.

We then demonstrate in Part II below that although an employer's knowledge of the precise details of an employee's protected speech is not a necessary element of a First Amendment unlawful discharge claim, the lack of such knowledge on the part of the individual officials involved in the decision to discharge the employee is a relevant consideration in determining whether those officials are immune from personal liability in damages.

ARGUMENT

I.

There can be no question that public employers violate the First Amendment when they dismiss public employees with the "motive" or "intent" of silencing the employees from speaking on matters of public concern. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech." *Rankin, supra*, 483 U.S. at 384. Thus, a "motive" or "intent" to silence public employees from speaking on matters of public concern is *sufficient* to establish a First Amendment violation. The question presented here, however, is whether such a motive or intent is a *necessary* element of a First Amendment unlawful discharge claim under *Connick* and *Pickering*.

A. Although the Court has never addressed this precise question in the present context, it has on numerous occasions rejected the proposition that a governmental "motive" or "intent" to punish or suppress the exercise of First Amendment rights is a necessary element of a First Amendment claim.

A good illustration is this Court's decision in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). In that case, an Alabama state court held the NAACP in contempt for refusing to obey an order compelling the NAACP to produce the names and addresses of members doing business in the State. The NAACP argued on behalf of its members that the production order unduly restricted the members' exercise of their free association rights in violation of the First Amendment. Alabama countered that there was no First Amendment violation because the *intended purposes* of the production order were legitimate and wholly unrelated to the suppression of First Amendment rights. The Court rejected Alabama's argument, finding that First Amendment rights are entitled to protection against *both* intended *and* unintended intrusions:

> The fact that Alabama, so far as is relevant to the validity of the contempt judgment presently under review, has taken no direct action, cf. *De Jonge v. Oregon, supra; Near v. Minnesota*, 283 U.S. 697, to restrict the right of petitioner's members to associate freely, does not end inquiry into the *effect* of the production order. See *American Communication Assn. v. Douds*, 339 U.S. 382, 402. In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action. Thus in *Douds*, the Court stressed that the legislation there challenged, which on its face sought to regulate labor unions and to secure stability in interstate commerce, would have

the practical effect "of discouraging" the exercise of constitutionally protected political rights, 339 U.S., at 393, and it upheld the statute only after concluding that the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms. Similar recognition of possible unconstitutional intimidation of the free exercise of the right to advocate underlay this Court's narrow construction of the authority of a congressional committee investigating lobbying and of an Act regulating lobbying, although in neither case was there an effort to suppress speech. *United States v. Rumely*, 345 U.S. 41, 46-47; *United States v. Harriss*, 347 U.S. 612, 625-626. The governmental action challenged may appear to be totally unrelated to protected liberties. [357 U.S. at 461 (emphasis added).]

Thereafter, in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), the Court succinctly restated this basic principle of First Amendment law:

> [R]egulatory measures . . . no matter how sophisticated, cannot be employed in purpose *or in effect* to stifle, penalize, or curb the exercise of First Amendment rights. [*Id.* at 297 (emphasis added).]

Just two Terms ago, in *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501 (1991), the Court again reaffirmed this basic principle:

> The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." Simon & Schuster need adduce "no evidence of an improper censorial motive." As we concluded in *Minneapolis Star*, "[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise

> of rights protected by the First Amendment." [*Id.* at 509 (citations omitted).]

Accord, e.g., NAACP v. Button, 371 U.S. 415, 439 (1963); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).[1]

B. The foregoing principle of law derives from both the language and purposes of the First Amendment. By its terms, the First Amendment proscribes governmental action "*abridging* the freedom of speech." Const., Amend. I (emphasis added). The exercise of free speech rights may be *abridged*, of course, without regard to whether the governmental actor intended such a result. *See, e.g., NAACP v. Alabama, supra*, 357 U.S. at 461 ("In the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that *abridgement* of such rights, even though unintended, may inevitably follow from varied forms of governmental action.") (emphasis added); *Simon & Schuster, supra*, 112 S. Ct. at 509 ("even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment").

Moreover, it is the grand purpose of the First Amendment to stimulate and nurture robust debate on issues of public concern. To this end, the Court's First Amendment cases emphasize the need for especially close judicial scrutiny of any governmental action that may dampen or "chill" such debate. *See, e.g., Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915

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[1] As *Simon & Schuster* illustrates, this principle applies even where the government does not directly prohibit speech, but places a burden on the person who engages in the unwanted speech. *Simon & Schuster* involved "a financial burden," 112 S. Ct. at 508; this case involves loss of employment, which is a burden both financially and otherwise.

& n.50 (1982). It is axiomatic that the chilling *effect* of governmental actions that burden the exercise of free speech rights does not necessarily depend on an impermissible governmental *intent* to suppress the exercise of those rights. *See NAACP v. Alabama, supra*, 357 U.S. at 461 (governmental action burdening protected First Amendment activity, though innocently motivated, may have the "practical effect 'of discouraging'" or "intimidat[ing]" that activity) (quoting *Douds, supra*, 339 U.S. at 393).

Accordingly, that the government may not have been aware of the protected nature of the speech in question, and thus did not form an intent to suppress protected speech as such, does not render lawful government action that is in effect an abridgement of protected speech. *Cf. NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) (discussed *infra* pp. 10-12).

C. Although the First Amendment cases discussed in Part A. *supra* involved governmental regulatory or judicial action rather than governmental employment action, the basic First Amendment principle established in those cases—*viz.*, that the First Amendment proscribes governmental action the purpose *or effect* of which is to unduly restrict the exercise of First Amendment rights—is fully applicable in the public employment context. The "abridge[ment]" language of the First Amendment, of course, applies equally in both contexts. *See Givhan v. Western Line Consolidated Sch. Dist.*, 439 U.S. 410, 415 (1979). And so too does the First Amendment's purpose of stimulating and nurturing robust debate on issues of public concern. *See Pickering, supra*, 391 U.S. at 573. Indeed, the circumstances of this case demonstrate in stark terms the great damage to First Amendment interests that would result if this basic First Amendment principle were jettisoned in the public employment context.

If Churchill's version of the speech that directly led to her discharge proves to be accurate, then Churchill

> was speaking out on improper nurse staffing policies at McDonough District Hospital that endangered the quality of patient care, an issue that is most certainly a matter of public concern. [Pet. App. at 11.]

Irrespective of the "motive" or "intent" of the Hospital officials in discharging Churchill, the *direct effect* of that discharge would be to "abridge" Churchill's right to speak freely on an issue vitally affecting the health and welfare of the community. Such an abridgement, no matter how innocently motivated, strikes at the heart of the interests the First Amendment was designed to protect. As the court below observed,

> we have serious reservations about the questionable practice of transferring nurses from one discipline to another without adequate education and training, thus possibly jeopardizing the health and welfare of its patients, *and thereafter discharging an employee who properly points out the problems with the cross-training policy as implemented.* [*Id.* at 15 (emphasis added).]

Equally to the point, if the Hospital were free under the First Amendment to discharge Churchill for engaging in protected speech simply because it was mistaken about the true nature of that speech, the inevitable result would be to chill other Hospital employees from engaging in protected First Amendment activity. An employee who engages in protected First Amendment activity by speaking out, in a manner that is not disruptive or insubordinate, on an issue of public concern cannot know in advance how her speech might be reported by co-workers and whether the employer's investigation (if any) of the co-workers' reports will provide the employer with an accurate understanding of that speech. If an employee who wishes to speak out on an issue of public concern must bear the risk of losing her job in the event that her speech is inaccurately reported and ultimately misunderstood by the employer, the much safer course will be to refrain from that speech in the first instance.

To be sure, the interests of government *as employer* in maintaining order and discipline in the workplace may more readily justify the abridgement of free speech rights than the interests often asserted by government *as regulator*. *Compare Connick v. Myers, supra,* 461 U.S. at 143 *with First Nat'l Bank v. Bellotti,* 435 U.S. 765, 786 (1978). The unique interests of government employers, however, are fully accommodated by *Connick* and the *Pickering* balancing test; those employers do not need and are not entitled to the added protections of a "motive" or "intent" requirement that has absolutely no basis in First Amendment jurisprudence. If a public employer discharges an employee in the genuine belief that she has engaged in speech on a matter only of personal interest, *see Connick,* or unduly disruptive or insubordinate speech on a matter of public concern, *see Pickering, and that belief is borne out by the facts,* the employer has not violated the First Amendment. Conversely, where the employer's belief *is not borne out by the facts,* the discharge "infringes that employee's constitutionally protected interest in freedom of speech" in violation of the First Amendment. *Rankin, supra,* 483 U.S. at 383.

D. Although not a First Amendment case, similar considerations shaped this Court's decision in *NLRB v. Burnup & Sims, supra,* 379 U.S. 21, that a "motive" to "interfere with, restrain, or coerce" protected union activity is not a necessary element of an unfair labor practice charge under section (8)(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1). In *Burnup & Sims,* the employer discharged two employees who were attempting to organize the employer's workers based on *an inaccurate report from a co-worker* that the employees had threatened to dynamite the plant if their organizational efforts failed.[2] The court of appeals held

[2] At the time of the discharges the employer in *Burnup & Sims* knew that the employees were engaged in an activity—union organizing—that is "protected" under the federal labor laws (and thus an impermissible basis for discharge) so long as, *inter alia,*

that the discharge did not "interfere with, restrain, or coerce [the] employees in the exercise of the rights guaranteed in section 7 [of the NLRA]" because the employer had acted in the good faith (albeit mistaken) belief that the employees had engaged in misconduct in the course of their organizational activities, thereby forfeiting the protections of section 7. This Court reversed on the following grounds:

> Section 7 grants employees, *inter alia,* "the right to self-organization, to form, join, or assist labor organizations." *Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias.* Over and again the Board has ruled that § 8(a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. . . .
>
> That rule seems to us to be in conformity with the policy behind § 8(a)(1). *Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees.* Union activity often engenders strong emotions and gives rise to active rumors. *A protected activity acquires a precarious status if inno-*

it is not marred by acts of misconduct. Here, similarly, it is undisputed that the petitioners knew that Churchill was engaged in an activity—speech—that is "protected" under the First Amendment (and thus an impermissible basis for discharge) so long as, *inter alia,* it is not insubordinate or disruptive of the workplace. Such knowledge is no doubt a predicate to a claim that a discharge violates § 8(a)(1) or the First Amendment, because without such knowledge the essential but-for causational link between the protected activity and the discharge is absent. *See Burnup & Sims,* 379 U.S. at 23; *infra* pp. 12-14. The question in *Burnup & Sims,* as here, is whether knowledge of a more extensive and particularized kind is a necessary element of such an unlawful discharge claim. Specifically, does the employer need to know that the employee has exercised the right in question (*i.e.* the right to organize or the right to speak) in such a manner that the protected status of the right has not been forfeited. The employer lacked such

> *cent employees can be discharged while engaging in it, even though the employer acts in good faith.* It is the tendency of those discharges to weaken or destroy the § 8(a)(1) right that is controlling. [379 U.S. at 22-24 (citations omitted) (emphasis added).]

E. In support of their contention that the discharge of a public employee for engaging in protected speech violates the First Amendment only if the public employer has a state-of-mind—a "motive" or "intent"—to deprive the employee of her First Amendment rights, petitioners rely almost exclusively on this Court's decision in *Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle*, 429 U.S. 274 (1977). *See* Pet. Br. at 24-28; *see also* United States Br. at 14-17. This reliance is misplaced.

Mt. Healthy involved a fact pattern—and a resulting legal issue—that simply is not presented here. The fact pattern (a common one) in *Mt. Healthy* was this: the employee asserted that the employer had refused to renew his teaching contract because of his protected speech, and the employer—while not disputing that the protected speech played some part in its decision not to renew the contract—asserted that it would have reached the same decision based on non-speech considerations (*e.g.*, the employee's inadequate performance). The resulting legal issue, as this Court described it, was simply one of but-for "causation"—*viz.*, was the protected First Amendment speech the but-for cause of the nonrenewal, or would that nonrenewal have occurred even if the protected speech had not occurred. *See* 429 U.S. at 285-86.

Based on causation principles borrowed from "other areas of constitutional law," the Court formulated the following two-prong "test of causation" to be applied in fact

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knowledge in *Burnup & Sims* because he was acting on the basis of inaccurate reports that the employees had engaged in misconduct in the course of their organizational activities. Here, similarly, it is contended that the petitioners lacked such knowledge because they were acting on the basis of inaccurate reports that Churchill's speech was on a purely private matter and was in any event insubordinate and disruptive.

situations of this type. *Id.* at 286. First, the employee must show that his constitutionally protected conduct "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [public employer's] decision not to rehire him." *Id.* at 287 (footnote omitted). Second, if the employee carries that burden, the employer must be given an opportunity to show "that it would have reached the same decision as to [the employee's] reemployment even in the absence of the protected conduct." *Id.*

As we have already shown, there is no issue of but-for causation in this case. Petitioners acknowledge that Churchill's speech *directly led* to her discharge from employment. *See supra* p. 2. Moreover, petitioners do not contend, as did the employer in *Mt. Healthy*, that *non*-speech considerations entered into the decision to discharge Churchill. Accordingly, *Mt. Healthy* simply is inapposite here.

In any event, both the petitioners and the United States greatly overread *Mt. Healthy* even on its own terms. The petitioners and the United States seize upon the words "motivating factor" in the first prong of *Mt. Healthy*'s two-part causation test, which requires the employee to prove that her protected conduct "was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [employer's] decision not to rehire him." 429 U.S. at 287 (footnote omitted). In context, however, it is clear that the Court, in using the term "motivating factor," was simply referring to the requirement—essential to a finding of but-for causation in First Amendment discharge cases generally—that the employer know the speech occurred and that the speech be a factor in the employer's decision to discharge the employee. *Cf. Pickering, supra*, 391 U.S. at 574 ("a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment").

Obviously, if an employer discharges an employee without even knowing that the employee has engaged in speech,

there is no predicate for a claim that the discharge violates the First Amendment even if it subsequently comes to light that the speech occurred and that it was protected. In these circumstances, there would simply be no *but-for causational link* between the protected speech and the discharge. But this is a far cry from saying that where, as here, an employer consciously decides to discharge an employee *because of* speech that is in fact protected—and there is thus no issue of "motivation" in the strict causational sense—the employer can escape liability by showing that it had no state-of-mind—no "motive" or "intent"—to punish the employee for engaging in that protected speech. It is untenable to suggest that the *Mt. Healthy* Court meant to adopt such an unprecedented state-of-mind requirement in so casual a manner and with nary a mention of the Court's unbroken line of First Amendment decisions rejecting the existence of such a state-of-mind requirement. *See supra* pp. 5-8.[3]

[3] Petitioners also misconstrue *Mt. Healthy's* citation to footnote 21 of the Court's opinion (issued the same day) in *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 270 (1977). *See Mt. Healthy*, 429 U.S. at 287. According to petitioners, the citation to footnote 21 in the *Arlington Heights* opinion evidences the *Mt. Healthy* Court's intention to incorporate into First Amendment law the same state-of-mind requirement that the *Arlington Heights* Court found to exist in cases of alleged racial discrimination under the Equal Protection Clause. *See* Pet. Br. at 25-26 & n.24. The problem with petitioners' argument, however, is that footnote 21 contains no substantive discussion of the Equal Protection Clause's state-of-mind requirement; that requirement is discussed (and reaffirmed) in an earlier portion of the Court's opinion. *See* 429 U.S. at 264-66. Footnote 21 merely makes the point—with a cross-reference to *Mt. Healthy* itself—that a two-part causation test applies under the Equal Protection Clause when governmental actions are based in part on a discriminatory purpose and in part on a non-discriminatory purpose. By citing this footnote, the *Mt. Healthy* Court was (it appears) simply buttressing its point that this two-part *causation* test applies "[i]n other areas of constitutional law." 429 U.S. at 286. Had the *Mt. Healthy* Court intended instead to incorporate the Equal Protection Clause's state-of-mind requirement into First Amendment law, it more likely would have done so after a more extended discussion and with specific reference to that portion of the *Arlington Heights* opinion addressing that state-of-mind requirement.

F. The petitioners' reliance on *Daniels v. Williams*, 474 U.S. 327 (1986), *see* Pet. Br. at 26, is equally misplaced. In *Daniels*, this Court held that only intentional deprivations of life, liberty and property are cognizable under the Due Process Clause of the Fourteenth Amendment. At the same time, however, the Court noted that the existence of such a state-of-mind requirement depends on the particular constitutional right in question. *See* 474 U.S. at 330 ("in any given § 1983 suit, the plaintiff must . . . prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim"). As we have already shown, it is well-established by the decisions of this Court that *First Amendment rights* are entitled to protection against both intended and unintended abridgements. *See supra* pp. 5-8.

G. Finally, there is no merit to the assertion of petitioners and the United States that the court below erred in imposing on public employers an unprecedented "duty to investigate" the details of a public employee's speech. Pet. Br. at 36-38; United States Br. at 17-22.

The court below imposed no such "duty to investigate." Indeed, the court *rejected* Churchill's argument that the First Amendment contains a "due process" component that requires an employer to follow certain minimum procedures before discharging an employee on the basis of her speech. *See* Pet. App. at 22-23.

The court below simply held that an employer who discharges an employee on the basis of speech that is in fact protected violates the First Amendment without regard to the depth of the employer's knowledge of and investigation into the precise content of that speech. *Id.* at 25. As we have already shown, that holding is faithful to a basic First Amendment principle repeatedly reaf-

firmed by the decisions of this Court. *See supra* pp. 5-8. If that holding were to have the *practical effect* of encouraging public employers to undertake more careful investigations before discharging employees on the basis of their speech, that would be a positive good and not a reason for reversal. *See supra* pp. 8-12.

II.

Although a public employer violates the First Amendment when it discharges an employee on the basis of speech that is in fact protected, even if the employer does not know the precise content of that speech, the second issue presented here is whether such lack of knowledge may provide the basis for a qualified immunity defense on the part of *the individual officials* involved in the decision to discharge the employee. *See* Petition for Certiorari at i. If such a qualified immunity defense applies, then the individual officials would not be personally liable in damages for the First Amendment violation. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987).[4]

On this quite separate issue, we believe that the court below may have overstated matters to some extent in declaring that "ignorance of the nature of the employee's speech

[4] Whether or not individual officials could establish a qualified immunity defense, *the government entity itself* would be liable for prospective injunctive relief (reinstatement) and for damages if a government official with final policymaking authority made, approved or ratified the decision to discharge the employee because of her speech. *Cf. City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion). Moreover, in our view the government entity could be required to *reinstate* the employee even if the decision to discharge her was not made, approved or ratified by an official with final policymaking authority, although the government entity would not be *monetarily* liable in such circumstances. *See Chaloux v. Killeen*, 886 F.2d 247, 249-51 (9th Cir. 1989); *but see Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1477-78 (9th Cir. 1993) (Fletcher, J., concurring) (disagreeing with *Chaloux* on this point).

Because the issue of the Hospital's potential liability on the facts of this case is not properly before the Court, *see* Petition for Writ of Certiorari at i, we do not address that issue here.

(in particular in light of the record before us) is inadequate to insulate officials from a § 1983 action." Pet. App. at 27. Under *Anderson v. Creighton, supra,* a public official is immune from damages liability in a § 1983 action if, in light of the information available to the official at the time of the challenged action, a reasonable official would consider that action to be lawful. *See* 483 U.S. at 640-41. Accordingly, "ignorance" of the facts *may* in some circumstances be a valid defense when it comes to the assessment of personal damages liability in a case of this nature.

What the court below was driving at, we submit, is that a public official cannot necessarily claim immunity for discharging an employee in violation of the First Amendment if his "ignorance" of the protected nature of the employee's speech is attributable to mere reliance on co-worker reports and a minimal investigation into those reports. Because the law is well-established that an employer may not terminate an employee for engaging in protected speech, a public official cannot be deemed to have acted *reasonably* in discharging an employee on the basis of her speech unless the official had a *reasonable* basis for concluding that the speech was unprotected. Although co-worker reports of the employee's speech and a minimal investigation into those reports may in some instances provide such a basis, that will not always be the case—particularly where, as here, the reports do not even purport to be a complete account of what was said, and the employee is known to have previously voiced disagreements with management on matters of public concern. *See* Pet. App. at 2-7. In such a case, further inquiry may be necessary before a public official may be said to have a reasonable basis for concluding that the employee's speech was unprotected. *Cf. Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1443-45 (9th Cir. 1991) (police officers are entitled to qualified immunity under *Anderson v. Creighton* when they act reasonably to investigate the facts bearing on the issue of probable cause before effecting a warrantless arrest)

The nature and scope of the further inquiry (if any) that an official must undertake in order to claim immunity in a case such as this will, of course, depend on the facts and circumstances confronting the official in each such case. *Cf. Anderson v. Creighton, supra,* 483 U.S. at 641 ("The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.").

CONCLUSION

For the foregoing reasons the decision of the court below should be affirmed.

Respectfully submitted,

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